In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1191

IRVING B. KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1193

TELEPROMPTER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the grand jury was improperly constituted and that the Travel Act, 18 U.S.C. 1952, was improperly applied. Petitioner Kahn in addition raises issues concerning the applicability and interpretation of the perjury statutes, 18 U.S.C. 1621 and 1623. Petitioner Teleprompter Corporation further contends that Kahn's perjurious statement before the grand jury should not have been admitted in evidence against it.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on five counts of conspiracy and bribery in vio-

lation of the Travel Act, 18 U.S.C. 1952. Petitioner Kahn was also convicted of perjury, in violation of 18 U.S.C. 1621. Kahn was sentenced to concurrent terms of 5 years imprisonment and Teleprompter was fined a total of $10,000. The court of appeals affirmed in a lengthy opinion (Pet. App. A).

The facts are set forth in the opinion below (Pet. App. 2a-6a).[1] They show in essence that in 1966, Kahn, the founder, president, and chairman of the board of Teleprompter, acting on its behalf, gave a $15,000 bribe to three Johnstown, Pennsylvania city officials (the mayor and two city councilmen) to insure Teleprompter's retention of a local cable television franchise. Trips between New York and Pennsylvania, as well as the use of interstate telephone facilities, were shown to have been part of the scheme.

Later, before a federal grand jury, on December 17, 1970, Kahn denied that he had ever paid any money to any Johnstown officials. Upon being confronted with evidence of a payment of $7500, he claimed that the money had been paid to the mayor's son for a public opinion survey (Tr. 601-652). By December 29, 1970, the mayor and councilmen all had admitted in testimony before the grand jury that the $7500 payment, as well as two further payments, was in fact made to them as a bribe (Tr. 224-227). On January 6, 1971, Kahn told an assistant United States Attorney that in reality he had been the victim of an extortionate scheme (see petitioner Kahn's reply brief in the court of appeals, footnote at p. 32). Kahn volunteered to return to the grand jury on the condition that he be permitted to read a prepared statement without being cross-

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[1] References to "Pet. App." refer to identical portions of both petitioners' appendices.

examined by the government (see the government's brief in the court of appeals, footnote at p. 55). In that statement, which he was permitted to read to the grand jury on January 27, 1971, Kahn admitted knowing that the falsity of his prior denials of wrongdoing had already been exposed, but he claimed to have recalled facts, previously forgotten, which allegedly constituted a defense to the bribery charges.[2]

In response to petitioners' varied claims, we rely primarily on the extensive and thorough opinion of the court below; however, we make the following additional points:

1. Contrary to the claim of petitioner Kahn (Kahn Pet. 6-9) this case raises no conflict among the courts of appeals on the question whether the government has the discretion to prosecute perjury committed before a grand

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[2]Kahn's January 27, 1971, testimony before the grand jury, which was read into the record at trial, stated in part as follows (Tr. 658-661):

> Now, I have had a rather extensive search of the files made. We have looked through our old files in the warehouse and in the files of our Johnstown company as well as in the files of Teleprompter's office in New York. Also, I have spoken to present and former employees of Teleprompter and to our local attorney in Johnstown.
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> From all of these investigations, we have discovered facts and records which I never knew of or did not recall when I testified here on December 17th.
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> * * * * *
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> I understand that others have testified in this matter and that I have been accused of bribing a public official in connection with the Johnstown franchise.
>
> Those who have accused me are criminals and coerced me into paying money. In short, they made it plain that they would effectively interfere with and obstruct our legitimate business in Johnstown unless they were paid money.

jury under either 18 U.S.C. 1621 or 18 U.S.C. 1623. The court below specifically stated (Pet. App. 21a) that it did not reach that question. Subsequently, in *United States* v. *Ruggiero*, 472 F. 2d 599, the Second Circuit held that the government was entitled to prosecute under 18 U.S.C. 1623 rather than 18 U.S.C. 1621 so long as, in doing so, it did not discriminate against any class of defendants. There is no conflict between *Ruggiero* and *United States* v. *Clizer*, 464 F. 2d 121 (C.A. 9), certiorari denied, 409 U.S. 1086, where the Ninth Circuit simply held that an indictment which tracked the language of 18 U.S.C. 1623 charged that offense even though it mistakenly referred to 18 U.S.C. 1621. See our memorandum in opposition to the petition for a writ of certiorari in *Clizer*.

2. As the court below noted, Kahn was not prejudiced by the government's decision to prosecute under 18 U.S.C. 1621 rather than 18 U.S.C. 1623 (Pet. App. 21a). The government's burden of proof under Section 1623 is less favorable to a defendant than the "two-witness" requirement applicable under Section 1621, and Kahn additionally obtained the benefit of consideration by the trial court of his alleged "recantation defense" under Section 1623(d) (Tr. 1179-1182).[3] Thus "Kahn got at least his due, if not more, on the evidence" (Pet. App. 21a).

Kahn, who raised his alleged recantation defense out of the presence of the jury in a motion for judgment of acquittal (Tr. 999-1008), now contends (Kahn Pet.

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[3]In a memorandum opinion denying Kahn's post-trial motions, after assuming *arguendo* that Section 1623(d) applied to Kahn and had not been waived, the trial court refused to bar his prosecution because the court found that Kahn's second statement was not a recantation and that, in any event, the falsity of his earlier testimony had already been exposed. We are lodging with the Clerk a copy of the trial court's memorandum opinion, which is reprinted at pp. 1040-1050 of the appellants' appendix in the court of appeals.

9-13) that this statutory bar to prosecution is a jury question and that the trial court was in error for failing to instruct the jury, *sua sponte*, that it could find that Kahn's perjury prosecution was barred by Section 1623(d). But since Kahn never requested jury consideration of or a jury instruction on this matter, he should not now be heard to complain that the issue was properly one for the jury. Rule 30, Fed.R.Crim.P.[4]

3. Teleprompter claims (Teleprompter Pet. 27-28) that there was insufficient proof that Kahn was acting as Teleprompter's agent on December 17, 1970 when he testified falsely before the grand jury. The court of appeals, after noting that Kahn was president, founder, chairman of the board and a major stockholder of Teleprompter at the time he testified about the company's franchise in Johnstown, properly dismissed this claim (Pet. App. 34a, n. 21). Kahn's December 17th grand jury statement shows on its face that Kahn was speaking for both himself and Teleprompter. At the outset of the grand jury hearing, Kahn identified the attorneys who had accompanied him as counsel to the corporation and stated that he had no personal counsel (Tr. 604). In response to questions, Kahn gave his home address, telephone number, occupation, explained "what Teleprompter Corporation is and what it does" (Tr. 605), and traced "the history of the operations of Teleprompter in Johnstown, Pennsylvania * * *" (Tr. 610). Kahn understood and answered all the questions as relating to both his and Teleprompter's actions (see, *e.g.*, Tr. 614, 622, 625, 627, 631, 635, 649-650). In addition, the evidence at trial showed, and Teleprompter

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[4]Since Section 1623(d) makes recantation a "bar" to prosecution, it is likely that it was correctly treated by the district court as a question of law. See Pet. App. 22a, n. 9.

conceded (Tr. 585-588), that as president of the corporation Kahn had the authority to represent and speak for the company. There is no evidence in the record that Teleprompter had withdrawn from Kahn the authority to speak for it before December 17, 1970.

4. Both Kahn and Teleprompter (Kahn Pet. 16-23; Teleprompter Pet. 7-24) contend that the courts below erred in their application of the Travel Act by interpreting Pennsylvania state law as not recognizing extortionate coercion as a complete defense to a charge of bribery. Their primary contention is that the court below failed sufficiently to investigate Pennsylvania decisional law and to analogize from New York law. They contend that the court below improperly imposed federal principles. However, what the court of appeals did was exercise its proper responsibility of determining what Pennsylvania courts were likely to do if faced with the issue. Petitioners conceded in the court below that the Pennsylvania courts had not decided whether extortion is a complete defense to a charge of bribery (Teleprompter's brief in the court of appeals, pp. 31, 32; Kahn's brief in the court of appeals, p. 52; Kahn's reply brief in the court of appeals, p. 17). Moreover, both courts below considered (Pet. App. 9a, 41a) the Pennsylvania decisions on bribery and extortion and determined that they provided no clear guidance on this issue. Futhermore, unlike the New York statute, Pennsylvania law does not provide any excuse for paying a bribe. Compare 18 Pa. Stat. 4303 and 4304, and 53 Pa. Stat 35911, with N.Y. Penal Law Section 200.05 There was thus ample basis for the holding of both courts below "that the Pennsylvania courts would not recognize proof of extortion as a complete defense to bribery charges" (Pet. App. 10a). There is no need for

this Court to review the lower courts' reading of Pennsylvania law.[5]

5. Petitioners' challenges to the jury selection plan (Teleprompter Pet. 24-27) were fully considered and properly rejected by both courts below (Pet. App. 27a-29a, 51a-62a), in accord with the decisions of other courts in similar cases *United States* v. *Blair*, 470 F. 2d 331, 333-337 (C.A. 5), certiorari denied *sub nom. Crews* v. *United States*, March 26, 1973 (No. 72-6021); *Chase* v. *United States*, 468 F. 2d 141 (C.A. 7); *United States* v. *Ross*, 468 F. 2d 1213 (C.A. 9); *United States* v. *Guzman*, 468 F. 2d 1245 (C.A. 2).[6]

For the above reasons and the grounds set forth in the opinions below, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[5]Petitioner Kahn further contends (Kahn Pet. 13-16) that the Travel Act prohibits only "racketeering" and that he is not a racketeer. This contention was fully considered and rejected by the courts below. See Pet. App. 25a-27a, 45a-50a.

[6]Petitioners now contend that it was "fundamental error" (Teleprompter Pet. 24) for the trial court to deny their request for a hearing to present questionnaire data on the issue of grand jury composition. However, petitioners' request for discovery of the questionnaire data was properly denied by the district court (Pet. App. 51a-62a), and therefore no purpose would have been served by holding the hearing.